No. 97-6146

In the

Supreme Court of the United States

October Term, 1997

ANGEL JAIME MONGE,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari To the
Supreme Court of the State of California

BRIEF OF THE STATES OF MASSACHUSETTS, [illegible] COLORADO, CONNECTICUT, [illegible] GEORGIA, IDAHO, ILLINOIS, [illegible] LOUISIANA, MARYLAND, [illegible] MONTANA, [illegible] NEW YORK, [illegible] DAKOTA, OHIO, [illegible] PENNSYLVANIA, RHODE [illegible] SOUTH DAKOTA, [illegible] VIRGINIA, WEST [illegible] AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

SCOTT HARSHBARGER
Attorney General of Massachusetts
* ELYSE H. LASKY
Assistant Attorney General
One Ashburton Place
Boston, MA 02108
(617) 727-2200

[illegible]
Deputy Solicitor
[illegible]
National Association of
Attorneys General
750 First St., N.E., Suite 1100
Washington, D.C. 20002

* *Counsel of Record*
[additional counsel listed on inside cover]

BRUCE M. BOTELHO
Attorney General of Alaska
P.O. Box 110300
Diamond Courthouse
Juneau, AK 99811-0300

WINSTON BRYANT
Attorney General of Arkansas
200 Tower Building
323 Center Street
Little Rock, AR 72201-2610

GALE A. NORTON
Attorney General of Colorado
1525 Sherman Street
Denver, CO 80203

RICHARD BLUMENTHAL
Attorney General of Connecticut
55 Elm Street
Hartford, CT 06141-0120

M. JANE BRADY
Attorney General of Delaware
Carvel State Office Building
820 North French Street
Wilmington, DE 19801

ROBERT A. BUTTERWORTH
Attorney General of Florida
The Capitol
PL-01
Tallahassee, FL 32399-1050

THURBERT E. BAKER
Attorney General of Georgia
40 Capitol Square, S.W.
Atlanta, GA 30334-1300

ALAN G. LANCE
Attorney General of Idaho
Statehouse
Boise, ID 83720-1000

JIM RYAN
Attorney General of Illinois
James R. Thompson Center
100 West Randolph Street
Chicago, IL 60601

JEFFREY A. MODISETT
Attorney General of Indiana
Indiana Government
Center South
Fifth Floor
402 West Washington Street
Indianapolis, IN 46204

TOM MILLER
Attorney General of Iowa
Hoover State Office Building
Des Moines, IA 50319

CARLA J. STOVALL
Attorney General of Kansas
Judicial Building
301 West Tenth Street
Topeka, KS 66612-1597

RICHARD P. IEYOUB
Attorney General of Louisiana
Department of Justice
P.O. Box 94095
Baton Rouge, LA 70804-4095

J. JOSEPH CURRAN JR.
Attorney General of Maryland
200 Saint Paul Place
Baltimore, MD 21202-2202

ROBERT H. ROMINGER III
Attorney General of Minnesota
State Capitol
Suite 102
St. Paul, MN 55155

MICHAEL MOORE
Attorney General of Mississippi
Department of Justice
P.O. Box 220
Jackson, MS 39205-0220

WILLIAM L. (JAY) NIXON
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101

JOSEPH P. MAZUREK
Attorney General of Montana
Justice Building
215 North Sanders
Helena, MT 59620-1401

DON STENBERG
Attorney General of Nebraska
State Capitol
P.O. Box 98920
Lincoln, NE 68509-8920

FRANKIE SUE DEL PAPA
Attorney General of Nevada
Old Supreme Court Building
100 North Carson Street
Carson City, NV 89701

PETER VERNIERO
Attorney General of New Jersey
Richard J. Hughes
Justice Complex
25 Market Street
CN 080
Trenton, NJ 08625

DENNIS C. VACCO
Attorney General of New York
Department of Law
The Capitol
Albany, NY 12224

MICHAEL F. EASLEY
Attorney General
of North Carolina
Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629

HEIDI HEITKAMP
Attorney General
of North Dakota
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505-0040

BETTY D. MONTGOMERY
Attorney General of Ohio
30 East Broad Street
Columbus, OH 43266-0410

W. A. DREW EDMONDSON
Attorney General of Oklahoma
State Capitol, Room 112
2300 North Lincoln Boulevard
Oklahoma City, OK 73105

HARDY MYERS
Attorney General of Oregon
Justice Building
1162 Court Street NE
Salem, OR 97310

MIKE FISHER
Attorney General
of Pennsylvania
Strawberry Square
Harrisburg, PA 17120

JEFFREY B. PINE
Attorney General
of Rhode Island
150 South Main Street
Providence, RI 02903

CHARLIE CONDON
Attorney General
of South Carolina
Rembert C. Dennis
Office Building
P.O. Box 11549
Columbia, SC 29211-1549

MARK BARNETT
Attorney General
of South Dakota
500 East Capitol
Pierre, SD 57501-5070

JOHN KNOX WALKUP
Attorney General of Tennessee
500 Charlotte Avenue
Nashville, TN 37243

DAN MORALES
Attorney General of Texas
Capitol Station
P.O. Box 12548
Austin, TX 78711-2548

WILLIAM H. SORRELL
Attorney General of Vermont
109 State Street
Montpelier, VT 05609-1001

Mark L. Earley
Attorney General of Virginia
900 East Main Street
Richmond, VA 23219

DARRELL V. MCGRAW JR.
Attorney General
of West Virginia
State Capitol
Charleston, WV 25305

WILLIAM U. HILL
Attorney General of Wyoming
State Capitol Building
Cheyenne, WY 82002

QUESTION PRESENTED

Does the Double Jeopardy Clause apply to noncapital sentencing proceedings that have the hallmarks of a trial on guilt or innocence?

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INTEREST OF THE AMICI CURIAE

The Commonwealth of Massachusetts and 37 other *amici* States submit this brief in support of the respondent. Each of the *amici* States has at least one provision permitting or requiring enhanced sentencing of a defendant convicted of a second or subsequent offense. In enacting these sentence enhancement provisions, the *amici* have sought to strike a balance between their interest in punishing crime and recidivism and their interest in providing procedural safeguards for defendants facing enhanced sentences due to their recidivism. This case directly affects both interests. If the decision below is reversed, *amici* will lose the right to apply their sentence enhancement statutes in many cases, and will be penalized for instituting procedures their legislatures believe will achieve greater fairness in sentencing.

SUMMARY OF ARGUMENT

Until this Court's decision in *Bullington v. Missouri*, 451 U.S. 430 (1981), it had consistently held that the Double Jeopardy Clause of the Fifth Amendment does not pertain to sentencing proceedings, except to bar imposition of multiple punishment for a single offense. *Bullington* departed from that long-standing rule, holding that the Double Jeopardy Clause prohibited a state from seeking the death penalty at retrial of a defendant "after an initial conviction, set aside on appeal, ha[d] resulted in rejection of the death sentence." *Arizona v. Rumsey*, 467 U.S. 203, 209 (1984) (*citing Bullington*, 451 U.S. at 430). Relying upon the Court's recognition in *Bullington* that the capital sentencing hearing had "hallmarks of the trial on guilt or innocence," 451 U.S. at 439, the petitioner contends that application of the Double Jeopardy Clause to noncapital sentence enhancement proceedings turns upon the presence or

absence of such "hallmarks." Thus, petitioner argues that where noncapital sentence enhancement proceedings have such "hallmarks," the Double Jeopardy Clause permits the government only one opportunity to prove a defendant's prior convictions for the purpose of enhancement. The petitioner is wrong for several reasons.

1. The protection afforded by the Double Jeopardy Clause is against multiple punishment or prosecution for the same "offense." Sentence enhancement proceedings do not place the defendant in jeopardy for "an offense." Such proceedings neither create a separate offense nor punish a defendant for prior convictions. Rather, they simply ascertain the defendant's prior conviction status, to determine whether he is eligible to receive a more severe sentence for his current conviction.

Furthermore, the Double Jeopardy Clause does not bar rehearing of a prior conviction allegation because a factfinder's rejection of such an allegation is not "an acquittal." This Court has made clear that it is only upon acquittal, or a determination tantamount to acquittal, that the Double Jeopardy Clause precludes a second hearing of allegations made against a defendant. Accordingly, the Court in *Bullington* analogized the jury's decision to impose a sentence of life imprisonment to "an acquittal of the death sentence." Because the pronouncement of sentence in noncapital sentencing proceedings has never been equated with a "conviction" or "acquittal" of sentence, and because such an analogy is particularly inapt to describe the sentence imposed following noncapital sentence enhancement proceedings, the Court should decline to extend the analogy used in *Bullington* to noncapital sentence enhancement proceedings.

2. If the Double Jeopardy Clause is to apply to sentencing at all, its application should be limited to capital sentencing schemes. The Court's recognition in *Bullington* that the proceeding at issue contained many of the features traditionally associated with a trial on guilt or innocence was not dispositive of the case. Rather, the Court examined the values underlying the Double Jeopardy Clause and found them to be equally applicable in the unique context of the capital sentencing hearing. Because they are not equally applicable to determinations of prior conviction status made for the purpose of sentencing, double jeopardy should not apply to those determinations.

In addition, the petitioner proposes an illogical application of *Bullington* which elevates form over substance. There is nothing in the mere presence or absence of certain procedural protections which suggests that double jeopardy protections must apply as well. Double jeopardy protection flows not from the form of a criminal trial, but from the values underlying the Double Jeopardy Clause. The petitioner's position relies upon the opposite conclusion, however, making a defendant's constitutional protection turn upon the form of a hearing, rather than upon the substance of the matter adjudicated there.

3. The "hallmarks" test proposed by petitioner would produce unpredictable and inconsistent results. Most, if not all, of the 50 states have at least one provision permitting or requiring enhanced sentencing of a defendant convicted of a second or subsequent offense, each of which has its own combination of applicable "hallmarks." Thus, the test posed by petitioner would require examination of each such state law to determine how many hallmarks apply, and how many are

enough to trigger the application of the Double Jeopardy Clause. Because it is unclear, however, how many "hallmarks" will bring a sentencing scheme within the ambit of the Double Jeopardy Clause, or what will be the standard measure of a "trial on guilt or innocence," petitioner's rule would yield inconsistent results in both the state and lower federal courts.

Finally, the rule advocated by petitioner effectively penalizes states for implementing procedural safeguards at sentencing and attempting to check the discretion of sentencing courts. In so doing, such a rule would act to the long-term disadvantage of defendants by prompting states to reconsider the safeguards they have chosen to provide defendants, and discouraging them from so providing in the future.

ARGUMENT

In *Stroud v. United States*, 251 U.S. 15, 18 (1919), this Court unanimously held that the Double Jeopardy Clause of the Fifth Amendment did not bar the imposition of the death penalty upon reconviction of a defendant whose initial conviction, set aside on appeal, had resulted in a sentence of life imprisonment. The Court adhered to this general principle for more than sixty years, repeatedly reaffirming that the Double Jeopardy Clause does not pertain to sentencing, except to bar imposition of multiple punishment for a single offense. *See North Carolina v. Pearce*, 395 U.S. 711, 720 (1969) ("[A]t least since 1919, when *Stroud v. United States*, 251 U.S. 15 was decided, it has been settled that a corollary of the power to retry a defendant is the power, upon reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction."); *Chaffin v. Stynchcombe*, 412 U.S. 17, 25 (1973)

("The possibility of a higher sentence on retrial [i]s recognized and accepted as a legitimate concomitant of the retrial process."); *United States v. DiFrancesco*, 449 U.S. 117, 137 (1980) ("the Double Jeopardy Clause does not require that a sentence be given a degree of finality that prevents its later increase").

The Court chose to depart from this long-standing rule in *Bullington v. Missouri*, 451 U.S. at 430. Noting that the capital sentencing hearing examined in *Bullington* was, in all relevant respects, a "trial on the issue of punishment," *id.* at 438, the Court likened the jury's imposition of a sentence of life imprisonment to the government's failure to prove the appropriateness of the death penalty. Thus, the Court concluded that in the event the defendant obtained reversal of his conviction and was retried and reconvicted, the Double Jeopardy Clause precluded the imposition of the death penalty. *Id.* at 444, 446. The petitioner, apparently relying upon the Court's recognition in *Bullington* that Missouri's capital sentencing scheme contained "hallmarks of the trial on guilt or innocence," *id.* at 439, now proposes a rule under which application of the Double Jeopardy Clause to noncapital sentence enhancement proceedings would depend upon the presence or absence of such "hallmarks." There is nothing in either history or logic, however, which compels, or even counsels, application of such a "hallmarks" test to noncapital sentencing proceedings. To the contrary, application of such a test is unwarranted as a matter of both law and policy.

I. THE DOUBLE JEOPARDY CLAUSE DOES NOT APPLY TO NONCAPITAL SENTENCE ENHANCEMENT PROCEEDINGS BECAUSE THEY DO NOT PLACE A DEFENDANT IN JEOPARDY FOR "AN OFFENSE" AND REJECTION OF A PRIOR CONVICTION ALLEGATION IS NOT AN "ACQUITTAL"

A. Sentence Enhancement Proceedings Do Not Place A Defendant In Jeopardy For "An Offense"

By its terms, the Double Jeopardy Clause provides that no person shall "be subject for the same *offence* to be twice put in jeopardy of life or limb." U.S. Const. amend. V (emphasis added). This Court has interpreted these words to afford protection against multiple punishment for the same offense, and against successive prosecution for the same offense. *See North Carolina v. Pearce*, 395 U.S. at 717; *Green v. United States*, 355 U.S. 184, 187 (1957). Because the adjudication of a prior conviction allegation, made for the purpose of possible sentence enhancement, does not place a defendant in jeopardy for "an offense," the Double Jeopardy Clause does not apply to such proceedings.

This Court has long recognized that "a charge under a recidivism statute does not state a separate offense, but goes to punishment only." *Parke v. Raley*, 506 U.S. 20, 27 (1992). *See Graham v. West Virginia*, 224 U.S. 616, 624 (1912); *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986) (enhanced sentencing statute did "no[t] create[] a separate offense calling for a separate penalty, [but] operate[d] solely to limit the sentencing court's discretion in selecting a penalty"); *see also Almendarez-*

Torres v. United States, _ U.S. _ , __ (1998) (slip op., at 2, 5) (observing that recidivism "is as typical a sentencing factor as one might imagine" and concluding that provision authorizing enhanced punishment for recidivism "is a penalty provision, which . . . does not define a separate crime.").

It is clear that a defendant sentenced under an enhancement scheme is not independently tried or sentenced simply for having prior convictions, or punished for the determination of his recidivist status as such. Rather, the defendant is given a more severe sentence for an underlying crime for which he has already been tried and convicted. *See Nichols v. United States*, 511 U.S. 738, 747 (1994) ("'repeat-offender laws . . . penaliz[e] only the last offense committed by the defendant.'") (*quoting Baldasar v. Illinois*, 446 U.S. 222, 232 (1980) (Powell, J., dissenting)). Toward that end, sentence enhancement proceedings merely seek to define the defendant's prior conviction status, to permit the court to select an appropriate penalty for the current conviction. *See Caspari v. Bohlen*, 510 U.S. 383, 396 (1994) (characterizing the matter adjudicated at sentence enhancement proceedings as a determination of "[p]ersistent-offender status").

The nature of the allegation adjudicated in sentence enhancement proceedings is not altered by the fact that the proceedings may share certain features of a traditional trial on guilt or innocence. *See McMillan v. Pennsylvania*, 477 U.S. at 89-90 (state's "dictat[ing] the precise weight to be given [sentencing] factor . . . [did] not transform [ ] . . . [that] factor into an 'element' of some hypothetical 'offense.'") Whether the state sentencing scheme requires the state to prove the existence of a defendant's prior convictions by a preponderance of the evidence or beyond a reasonable doubt, or requires

notice to a defendant and the application of the rules of evidence, a hearing to ascertain the existence of prior convictions is simply that, and cannot be called "the trial of an offense."

By contrast, the adjudication of guilt or innocence is clearly the classic trial of "an offense." Even the allegation adjudicated in the capital sentencing scheme at issue in *Bullington*, although not the prototypical trial of "an offense," can be characterized as a determination whether the defendant had committed an offense deserving of death. *See Poland v. Arizona*, 476 U.S. 147, 160 (1986) (Marshall, J., dissenting) ("the 'offense' for which the defendant receives his 'conviction' or 'acquittal' is that of the appropriateness of the death penalty").[1]

Moreover, the imposition of the death penalty is arguably part of the substantive offense of capital murder. The capital sentencing scheme not only permits, but requires, consideration of the facts underlying the murder conviction – in other words, the facts bearing on guilt or innocence. The aggravating and mitigating evidence presented to the jury relates to the same offense for which the defendant is being sentenced, and, if certain aggravating factors are found, the offense is "elevate[d] . . . from murder punishable by life imprisonment to murder punishable by death." *People v. Sailor*, 65 N.Y.2d 224, 232, 480 N.E.2d 701, 707, *cert. denied*, 474 U.S. 982 (1985). *See Linam v. Griffin*, 685 F.2d 369, 375 (10th Cir. 1982), *cert. denied*, 459 U.S. 1211 (1983)

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[1]The *amici* agree with the respondent that *Bullington* was erroneously decided and should be overruled. This brief makes the separate argument that, even assuming the correctness of *Bullington*, the Double Jeopardy Clause does not apply to noncapital sentencing proceedings.

(observing that although procedure in *Bullington* was technically bifurcated, "[i]n truth, the elements of the merits and the sentencing were wedded."); *see also Bullington*, 451 U.S. at 439 n.10 (finding significant that Missouri's capital sentencing statute required court, following guilty verdict, to "*resume the trial* and conduct a presentence hearing") (emphasis in *Bullington*). Thus, one can view the capital sentencing hearing as a continuation of the trial on guilt or innocence, to determine the magnitude of the defendant's offense.

Unlike the issues adjudicated in a capital sentencing hearing, the factfinder's determination of the defendant's status for the purpose of possible sentence enhancement is completely independent of the facts surrounding the crime for which the defendant is being sentenced. The single issue adjudicated at the sentence enhancement hearing is the existence of prior convictions. In other words, the inquiry is merely "whether or not the [defendant] standing before the court is the same person who was previously convicted as charged. The [factfinder] answers yes or no in accordance with the evidence." *Linam v. Griffin*, 685 F.2d at 375. This determination is not, "in all relevant respects . . . like the immediately preceding trial on the issue of guilt or innocence," *Bullington*, 451 U.S. at 438, and the factfinder, rather than determining the magnitude of the defendant's offense, simply ascertains whether prior convictions will affect the severity of current punishment. In short, "this is not the kind of adjudication that is referred to in the Fifth Amendment." *Linam v. Griffin*, 685 F.2d at 375.

B. Rejection Of A Prior Conviction Allegation Is Not "An Acquittal"

In 1896, this Court ruled that a criminal defendant who successfully appeals a judgment against him "may be tried anew . . . for the same offence of which he had been convicted." *United States v. Ball*, 163 U.S. 662, 672 (1896). Since that time, the Court has explained that the principle underlying *Ball* is primarily supported by two considerations. First, the Court has recognized that society would pay too high a price "were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction," *United States v. Tateo*, 377 U.S. 463, 466 (1964), and second, "the Court has concluded that retrial after reversal of a conviction is not the type of governmental oppression targeted by the Double Jeopardy Clause." *Tibbs v. Florida*, 457 U.S. 31, 40 (1982).

In *Burks v. United States*, 437 U.S. 1, 18 (1978), however, the Court announced a narrow exception to the general rule, holding that the Double Jeopardy Clause bars retrial of a defendant whose conviction is set aside on the basis of evidentiary insufficiency. Recognizing that the Double Jeopardy Clause absolutely bars retrial of a defendant after acquittal, *Green v. United States*, 355 U.S. at 188, the Court reasoned that "[a] reversal based on the insufficiency of the evidence has the same effect [as an acquittal] because it means that no rational factfinder could have voted to convict the defendant." *Tibbs*, 457 U.S. at 41. It is only upon acquittal, therefore, or a determination tantamount to acquittal, that the Double Jeopardy Clause bars the readjudication of an allegation against the defendant. *See DiFrancesco*, 449 U.S. at 133

("Appeal of a sentence . . . would seem to be a violation of double jeopardy only if . . . , for double jeopardy finality purposes, the imposition of the sentence is an 'implied acquittal' of any greater sentence.").

For this reason, *Bullington*'s holding necessarily rested upon the predicate determination that "the jury's decision to sentence Bullington to life imprisonment after his first conviction should be treated as an 'acquittal' of the death penalty under the Double Jeopardy Clause." *Poland v. Arizona*, 476 U.S. at 153. Such an analogy, far from a perfect fit in the *Bullington* context, *see Poland*, 476 U.S. at 159 (Marshall, J., dissenting) ("[t]he analogy, first drawn in *Bullington v. Missouri*, . . . between an acquittal at trial and an 'acquittal' of death at sentencing, is not perfect . . ."), is wholly inapt to describe a factfinder's rejection of a prior conviction allegation.

First, "[h]istorically, the pronouncement of sentence has never carried the finality that attaches to an acquittal." *DiFrancesco*, 449 U.S. at 133. *See also id.* at 132 ("neither the history of sentencing practices, nor the pertinent rulings of this Court, nor even considerations of double jeopardy policy support . . . an equation [of a criminal sentence to an acquittal]"). In *DiFrancesco*, the Court reaffirmed this principle, declining an invitation to liken the sentence imposed under a federal sentence enhancement scheme to an "acquittal" or "conviction" of sentence, despite the presence of procedural safeguards at sentencing. *Id.* at 133-137. That the proceedings at issue here may afford more procedural protections than traditional sentencing proceedings, or even more than those present in *DiFrancesco*, does not change the nature of sentences imposed in those proceedings, any more than the

safeguards employed by the federal sentencing court altered the nature of Mr. DiFrancesco's sentence. Petitioner's argument to the contrary ignores the "fundamental distinctions between a sentence and an acquittal, and . . . the particular significance of an acquittal." *Id.* at 133.

Second, even if the Court were inclined to analogize some forms of sentencing to "convictions" or "acquittals," the sentence imposed following a sentence enhancement proceeding simply cannot be described in such terms. Unlike the defendant acquitted following a trial on the issue of guilt or innocence, or the defendant "acquitted" of having committed a crime deserving death, the defendant facing an allegation that he has suffered prior convictions is not "acquitted" when the factfinder rejects that allegation, as the defendant's status as one with or without prior convictions does not change.

Whereas the defendant charged with a crime, or the one alleged to have committed a crime deserving death, cannot objectively be said to be "guilty" of that allegation until the factfinder pronounces him so, this is not the case for the defendant alleged to have suffered prior convictions. If a defendant does, in fact, have a prior conviction, the pronouncement of the factfinder simply cannot change that prior conviction status – any more than the defendant can be "acquitted" of being a certain age or sex.

Moreover, as noted by the New York Court of Appeals, the practical result of extending the analogy adopted in *Bullington* to noncapital sentence enhancement proceedings counsels against such an extension:

> [A]rguably extension of the double jeopardy clause to enhanced sentencing proceedings . . . would seemingly mean that a failure to prove a defendant's previous felony conviction for any reason, even prosecutorial mistake or carelessness, unrelated to the truth of such prior convictions, which are matters of public record, would forever bar the use of that prior conviction in any subsequent enhanced sentencing proceeding.

People v. Sailor, 65 N.Y.2d at 236, 480 N.E.2d at 710.

In fact, taken to its logical extreme, treating sentence enhancement rulings as "acquittals" or "convictions" could mean that a state may attempt use of a defendant's prior conviction for enhancement purposes only once, whether successful or not. If the state fails to prove the existence of a prior conviction, the defendant will be deemed "acquitted" of the allegation that he has a prior conviction, and the state prohibited from attempting to prove the existence of that conviction in the future, presumably in connection with any other conviction or sentence. If the state does meet its burden of proving the existence of a prior conviction, the defendant will be deemed "convicted" of that allegation, again barring the state from ever attempting to prove it again. *See Carpenter v. Chapleau*, 72 F.3d 1269, 1272 (6th Cir.), *cert. denied*, 117 S.Ct. 108 (1996) (noting that the court had rejected a double jeopardy challenge to the state's using the same predicate offense for enhancement of more than one sentence) (*citing Montgomery v. Bordenkircher*, 620 F.2d 127 (6th Cir.), *cert. denied*, 449 U.S. 857 (1980)).

Nowhere has this Court ever suggested that consideration by a sentencing court of a defendant's prior convictions, even more than once, is an evil which the Double Jeopardy Clause was designed to prevent. On the contrary, it has stressed that "the sentencing judge's 'possession of the fullest information possible concerning the defendant's life and characteristics' is '[h]ighly relevant – *if not essential* – [to the] selection of an appropriate sentence.'" *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (*quoting Williams v. New York*, 337 U.S. 241, 247 (1949)) (emphasis in *Lockett*). The Court should decline to adopt a rule which would cause such a result and which, in any event, constitutes an illogical extension of the analogy adopted in *Bullington*.

II. IF THE DOUBLE JEOPARDY CLAUSE IS TO APPLY TO SENTENCING AT ALL, IT SHOULD BE LIMITED TO CAPITAL SENTENCING SCHEMES

Although the petitioner has focused upon the Court's reference to "hallmarks" in formulating his proposed extension of *Bullington* to noncapital sentencing, there is no historical or logical reason to do so. The Court's recognition in *Bullington* that the capital sentencing proceeding contained many of the features traditionally associated with a trial on guilt or innocence was not, in and of itself, dispositive of the case. Rather, what drove the result in *Bullington* – and indeed, the enactment of the Double Jeopardy Clause itself – were several considerations not applicable to the present case. Those considerations (as well as the factors discussed in Section I, *supra*) compel the conclusion that *Bullington* should not be extended.

A. *BULLINGTON* WAS BASED, IN LARGE PART, UPON ITS CAPITAL CONTEXT

This Court has suggested on more than one occasion that an essential element of the result reached in *Bullington* – an element not present in the sentencing schemes at issue here – was the fact that the Court there examined a capital sentencing proceeding. As the Court expressly stated in *Caspari v. Bohlen*, 510 U.S. at 392, "[b]oth *Bullington* and [*Arizona v.*] *Rumsey*, [467 U.S. at 203] were capital cases, and [the] reasoning in those cases was based largely on the unique circumstances of a capital sentencing proceeding." *See also Pennsylvania v. Goldhammer*, 474 U.S. 28, 30 (1985) ("the decisions of this Court 'clearly establish that a sentenc[ing in a noncapital case] does not have the qualities of constitutional finality that attend an acquittal'") (bracketed phrase in original; citation omitted); *Bullington*, 451 U.S. at 446 ("the protection afforded by the Double Jeopardy Clause to one acquitted by a jury is also available to him, *with respect to the death penalty*, at his retrial") (emphasis added); *Poland v. Arizona*, 476 U.S. at 155 ("*Bullington* indicates that the proper inquiry is whether the sentencer or reviewing court has decided that the prosecution has not proved its case *that the death penalty is appropriate*") (emphasis in original; citation omitted).

The result reached in *Caspari* also confirms that *Bullington*'s holding depended in large part upon its capital context. In *Caspari*, 510 U.S. at 393, the Court concluded that petitioner sought the benefit of a "new rule" because a rule requiring application of the Double Jeopardy Clause to noncapital sentencing proceedings was not dictated by the Court's precedents. As the Court repeatedly emphasized in *Caspari*, the reason that *Bullington* did not dictate the rule

sought by Mr. Bohlen was the fact that *Bullington* involved capital sentencing proceedings, and *Caspari* did not.

That the result in *Bullington* was based, in large part, upon its having been a capital case is further supported by the Court's decision in *DiFrancesco*. The Court decided *DiFrancesco* in December, 1980. Only five months later, within the same Term, the Court rendered its decision in *Bullington*. The different reasoning employed by the Court in those two cases – and of course the opposite results reached – suggest that an important factor distinguishing the two decisions was the difference in the penalties at stake. In examining the sentence enhancement statute challenged in *DiFrancesco*, the Court began by noting that it was addressing a sentencing scheme, traced the history of the rule differentiating sentencing from acquittal, and applied that rule to reach the same result it always had – that the Double Jeopardy Clause did not apply to sentencing. In *Bullington*, however, the Court did not begin with its usual premise. Rather, the Court immediately distinguished those cases which had previously addressed double jeopardy challenges to sentencing, stating that "[t]he history of sentencing practices is of little assistance to Missouri in this case, since the sentencing procedures for capital cases instituted after the decision in *Furman* [*v. Georgia*, 408 U.S. 238 (1972)] are unique." 451 U.S. at 441-442 n.15. The different posture from which the Court began its analyses in *DiFrancesco* and *Bullington* makes clear that the difference in the penalties was a primary factor informing its analysis.

The National Association of Criminal Defense Lawyers (NACDL), *amicus curiae* in support of petitioner, argue that the rule announced in *Bullington* should not be limited to capital

cases because "death is only different in the sense that it is largely in death penalty cases that this Court has relied on the Eighth Amendment to require of the states special criteria or procedures to ensure equitable and reliable punishment or outcomes." NACDL Br. at 4 (emphasis omitted). This is not so. To be sure, the Court has interpreted the Eighth Amendment to require certain procedures at capital sentencing hearings which are not required at noncapital sentencing. Nevertheless, the Court's differing treatment of capital and noncapital proceedings has not been limited solely to cases arising under the Eighth Amendment. *See Barefoot v. Estelle*, 463 U.S. 880, 913 (1983) (Marshall, J., dissenting) ("Time and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case."); *see also Strickland v. Washington*, 466 U.S. 668, 686-687 (1984) (noting that the definition of "constitutionally effective assistance" may differ in capital and noncapital sentencing proceedings).

In any case, the contention that capital cases only differ from noncapital cases when being examined under the Eighth Amendment skirts the obvious point that the procedures employed in the sentencing scheme at issue in *Bullington* were only required *because* that was a capital sentencing scheme. The Court has construed the Eighth Amendment to require, in capital cases, procedural safeguards which guide the discretion of the sentencer. *See Furman v. Georgia*, 408 U.S. at 257, 310, 313; *Gregg v. Georgia*, 428 U.S. 153, 188-189, 197-198 (1976). These are the very same safeguards which rendered the *Bullington* procedure enough "like the trial on guilt or innocence" to bring it within the ambit of the Double Jeopardy Clause.

By contrast, the Court has not required legislatures to provide such safeguards in noncapital cases, *see Lockett v. Ohio*, 438 U.S. at 603, and most of the procedures employed in noncapital sentencing proceedings are merely a matter of legislative grace. It may be logical to conclude that because the Constitution requires certain safeguards at capital sentencing hearings, other constitutional protections will be deemed to apply as well. This conclusion is not so easily reached with reference to a hearing at which the majority of procedural safeguards have been granted, and may simply be withdrawn, by legislative enactment.

B. THE VALUES UNDERLYING THE DOUBLE JEOPARDY CLAUSE ARE NOT UNDERMINED BY READJUDICATION OF A PRIOR CONVICTION ALLEGATION

The "general design" of the Double Jeopardy Clause, *DiFrancesco*, 449 U.S. at 127, was eloquently described for the Court by Justice Black:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continued state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. at 187-188. Although the Court opined in *Bullington* that the values underlying the Double Jeopardy Clause are "equally applicable when a jury has rejected the State's claim that the defendant deserves to die," 451 U.S. at 445, they are not equally applicable to a simple factual determination that a defendant does or does not have a number of prior convictions, made for the purpose of choosing an appropriate sentence for a crime of which the defendant has already been convicted. At that point, as the Court observed in *DiFrancesco*, "[t]he defendant's primary concern and anxiety obviously relate to the determination of innocence or guilt, and that already is behind him." 449 U.S. at 136.

Moreover, the simplicity of the prior conviction inquiry, and its lack of factual relationship to the underlying convictions, distinguish the proceedings at issue here from those at issue in *Bullington*. In the capital context, both the trial on guilt or innocence and the sentencing hearing necessarily focus upon the defendant's behavior. The capital sentencing hearing not only permits but requires a detailed presentation of evidence regarding both the underlying crime and the character of the defendant. The sentencing scheme at issue here does no such thing. As described by the California Supreme Court,

> a prior conviction trial is simple and straightforward as compared to the guilt phase of a criminal trial. Often it involves only the presentation of a certified copy of the prior conviction along with the defendant's photograph and fingerprints. In many cases, defendants offer no evidence at all, and the outcome is relatively predictable. In this case,

> for example, the prior conviction trial, which looked more like an informal hearing than a trial, fills only a few pages of a 244-page reporter's transcript.

People v. Monge, 16 Cal. 4th 826, 838, 941 P.2d 1121, 1129 (1997).

For these reasons, the "embarrassment, expense and ordeal" and the "anxiety and insecurity" potentially faced by a defendant during the penalty phase of a capital murder trial – which the Court found must "surely [be] at least equivalent to that faced by any defendant at the guilt phase of a criminal trial," *Bullington*, 451 U.S. at 445 – are not equivalent to that experienced by a defendant simply facing a determination of his prior conviction status. Although a defendant may feel the anxiety associated with the potential imposition of an enhanced sentence, this is no different from the anxiety faced by any defendant awaiting sentencing. More importantly, it is not sufficient justification for extending the application of the Double Jeopardy Clause to sentence enhancement proceedings. *See DiFrancesco*, 449 U.S. at 137 ("The Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be.").

So too, any stigma potentially suffered by the defendant is associated not with the determination made at sentencing, but with the underlying conviction. A determination that the defendant should receive a longer sentence due to a prior conviction carries with it little if any of the stigma of a criminal conviction, and certainly not the degree associated with either

a criminal conviction or a determination that the defendant has committed a crime which is deserving of death.

The relative brevity and simplicity of the inquiry in a prior conviction proceeding also make inapplicable to noncapital sentence enhancement proceedings the final concern voiced by the Court in *Bullington* – "[t]he 'unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant,' thereby leading to an erroneously imposed death sentence, . . . if the State were to have a further opportunity to convince a jury to impose the ultimate punishment." 451 U.S. at 445-446 (*quoting DiFrancesco*, 449 U.S. at 130). Readjudication of a sentencing enhancement allegation will not so "wear down the defendant" that it will lead to an erroneous result. As the Court observed in *Caspari*,

> [p]ersistent-offender status is a fact objectively ascertainable on the basis of readily available evidence. Either a defendant has the requisite number of prior convictions, or he does not. Subjecting him to a second proceeding at which the State has the opportunity to show those convictions is not unfair and will enhance the accuracy of the proceeding by ensuring that the determination is made on the basis of competent evidence.

510 U.S. at 396.

C. THE PETITIONER'S "HALLMARKS TEST" IS AN ILLOGICAL APPLICATION OF *BULLINGTON* WHICH ELEVATES FORM OVER SUBSTANCE

Petitioner's position is apparently premised upon his belief that under *Bullington*, the presence of certain features at sentencing automatically invokes the protection of the Double Jeopardy Clause. There is nothing in the mere presence or absence of certain procedural safeguards, however, such as the granting of a jury trial, the application of the rules of evidence, or even the standard of proof beyond a reasonable doubt, which suggests that double jeopardy protections must apply as well. Contrary to petitioner's contention, the applicability of the one does not automatically flow from the presence of the other.

The Double Jeopardy Clause bars successive prosecutions of a criminal offense not because of the format of a criminal trial or the procedural safeguards employed there, but because of the values underlying the Double Jeopardy Clause. These values are independent of the "hallmarks"; indeed, the Double Jeopardy Clause predates many of what we today recognize as the "hallmarks" of a trial on guilt or innocence. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that criminal defendants have the right to counsel); *In re Winship*, 397 U.S. 358, 361 (1970) (observing that the standard of proof beyond a reasonable doubt only "crystallized" "as late as 1798"). Thus, even assuming that the sentencing scheme at issue here would meet petitioner's "hallmarks" test, it does not follow that the presence of such "hallmarks" should automatically trigger the protection of the Double Jeopardy Clause.

Moreover, petitioner's rule elevates form over substance. Under petitioner's test, a defendant sentenced under a statute requiring proof beyond a reasonable doubt or giving the sentencing court only two sentencing options would be protected by the Double Jeopardy Clause, while one sentenced under a statute requiring proof by a preponderance of the evidence or granting the sentencing court a third option would have no such protection. Such a test, which examines the form of a hearing without contemplating its purpose or true effect upon a particular defendant, ignores the goals served by the Double Jeopardy Clause.

It cannot be the case that a constitutional protection as important as that afforded by the Double Jeopardy Clause will turn upon the procedural niceties established from state to state, or that simply reducing the standard of proof or granting the sentencing court a third choice will suffice to remove a sentencing scheme from the ambit of the Double Jeopardy Clause, where it would otherwise apply. A holding which yields this result diminishes the value of the constitutional protection itself. *See Sandin v. Conner*, 515 U.S. 472, 489 (1995) (Ginsburg, J., dissenting) ("Deriving protected liberty interests from . . . local . . . codes would make of the fundamental right something more in certain States, something less in others. Liberty that may vary from . . . New York, to . . . California, does not resemble the 'Liberty' enshrined among 'unalienable Rights' with which all persons are 'endowed by their Creator.'") (*quoting* the Declaration of Independence).

III. A "HALLMARKS TEST" WOULD PRODUCE UNPREDICTABLE AND INCONSISTENT RESULTS, PENALIZE STATES FOR PROVIDING PROCEDURAL SAFEGUARDS AT SENTENCING, AND DISCOURAGE STATES FROM DOING SO IN THE FUTURE

Most, if not all, of the 50 states have at least one provision permitting or requiring enhanced sentencing of a defendant convicted of a second or subsequent offense.[2] Each provision – whether a "three strikes law," a habitual or persistent offender statute, or a provision for enhanced sentencing for second or subsequent offenses – has its own

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[2] Between 1993 and 1995, 24 states and the federal government enacted "three strikes" laws. Donna Lyons, *"Three Strikes" Legislation Update*, NAT'L CONF. ST. LEGIS., Dec. 1995. Twenty-three of those 24 states also have provisions for enhanced penalties for repeat offenders which predate their "three strikes" legislation. John Clark, et al., *"Three Strikes and You're Out": A Review of State Legislation*, NAT'L INST. JUST. RES. IN BRIEF, Sept.1997, at 1, 9-10, exh. 10. In addition, almost every other state has at least one provision for enhanced sentencing of a habitual or persistent offender, or for second or subsequent offenses. *See, e.g.*, Alaska Stat. § 12.55.125(l); Ariz. Rev. Stat. § 13-604; Conn. Gen. Stat. § 53a-40; Del. Code Ann. tit. 11, §§ 4214, 4215; Haw. Rev. Stat. §§ 706-661, 706-662, 706-606.5; Ind. Code § 35-50-2-8; Iowa Code § 902.8; Ky. Rev. Stat. § 532.080; La. Rev. Stat. 15:529.1; Mass. Gen. L. ch. 279, § 25; Mo. Rev. Stat. § 558.016; Neb. Rev. Stat. § 29-2221; Nev. Rev. Stat. § 207.010; N.Y. Penal Laws §§ 70.04, 70.06, 70.08, 70.10; Okla. Stat. tit. 21, § 51; S.D. Codified Laws § 22-7-7; Wyo. Stat. §§ 6-10-201, 6-10-203. *See also Parke v. Raley*, 506 U.S. at 26-27 (noting that all 50 states and the federal government have enacted statutes which punish recidivism).

combination of applicable "hallmarks."[3] Thus, the test proposed by petitioner would require examination of each such state law to determine how many "hallmarks" are present. Because it is unclear, however, how many "hallmarks" will bring a sentencing scheme within the ambit of the Double Jeopardy Clause, which particular hallmarks will have that effect, or what will be the standard measure of a "trial on guilt or innocence," petitioner's rule would yield unpredictable and inconsistent results. *See People v. Levin*, 157 Ill. 2d 138, 147-148, 623 N.E.2d 317, 322 (1993), *cert. denied*, 513 U.S. 826 (1994) (observing that the Court in *Bullington* "did not address whether the presence of any one of the three trial-like factors upon which it relied would have been sufficient, alone, to support its trial analogy" or "place greater significance on any one factor over another.").

For example, because each state's procedure for the adjudication of guilt or innocence may differ in the number and type of "hallmarks," it is unclear whether the petitioner would require each state's sentencing proceeding to be measured against its own form of the trial on guilt or innocence, or against some general standard to be created by this Court. A decision adopting the petitioner's test, but declining to create a single standard against which to measure each state law, would introduce an element of unpredictability into the law, potentially generating inconsistent decisions in both the state

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[3]For instance, of those states which require a separate hearing on sentence enhancement allegations, some require prior conviction allegations to be proven by a preponderance of the evidence, *see, e.g.*, Fla. Stat. § 775.084(3)(a)(4); N.D. Cent. Code § 12.1-32-09(4); 42 Pa. Cons. Stat. § 9714(D); Utah Code § 76-3-203.5(4)(c), while others require the allegations to be proven beyond a reasonable doubt. *See, e.g.*, Ind. Code § 35-50-2-8(d); La. Rev. Stat. 15:529.1D(1)(b); Mass. Gen. L. ch. 278, § 11A.

courts and the lower federal courts as those courts disagree about the quality and quantity of "hallmarks" which trigger the application of the Double Jeopardy Clause.[4] A clear statement that the Double Jeopardy Clause does not apply to noncapital sentencing proceedings will prevent this result.

Limiting *Bullington* to capital sentencing hearings will also avoid an equally disturbing result. For the most part, the procedural safeguards provided by the states at noncapital sentence enhancement hearings are a matter of choice, not constitutional entitlement. If the states find, however, that by increasing procedural safeguards at sentencing proceedings they subject themselves to greater judicial scrutiny, and bring those proceedings within the ambit of the Double Jeopardy Clause, they may be forced to reconsider the safeguards which have been provided thus far, and discouraged from so providing in the future. *See Tibbs v. Florida*, 457 U.S. at 45 n.22 (noting that construing the Double Jeopardy Clause to bar retrial after a conviction is set aside as against the weight of evidence might serve to eliminate a practice which protects defendants by "prompt[ing] state legislatures simply to forbid [appellate] courts to reweigh the evidence.").

In *Sandin v. Conner*, 515 U.S. at 482, this Court recognized that finding constitutional entitlements in the mere fact that states had promulgated regulations to confine the discretion of prison personnel created disincentives for the states to do so, "discourag[ing] this desirable development."

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[4]In fact, double jeopardy challenges to sentence enhancement proceedings have already created a number of divergent opinions in the state and federal courts. *See People v. Monge*, 16 Cal. 4th at 839-841, 941 P.2d at 1130 (discussing opinions accepting and rejecting such claims).

The same can be said here. There is no question that procedural safeguards at sentencing benefit the defendant, yet the rule proposed by petitioner discourages states from providing them. Likewise, given the Court's recognition in *Bullington* that unfettered discretion in the sentencer is a "hallmark" of traditional sentencing, whereas limited discretion is a "hallmark" of the trial on guilt or innocence, 451 U.S. at 439-441, petitioner's approach would discourage the states' implementation of statutes which guide the discretion of the sentencing court. Yet to do so would undermine what this Court has described as a positive development in the law. *See DiFrancesco*, 449 U.S. at 142-143 (noting that it had "been observed . . . that sentencing is one of the areas of the criminal justice system most in need of reform" and approving the sentencing scheme at issue as "a check upon th[e] unlimited power [of sentencing courts], [which] should lead to a greater degree of consistency in sentencing") (*citing* M. Frankel, Criminal Sentences: Law Without Order (1973)).

Given the lengthy sentences potentially available under state sentence enhancement laws, the states' implementation of procedural safeguards at sentencing and their legitimate efforts to guide the discretion of sentencing courts should be lauded and encouraged. Like the rule rejected in *Sandin*, the rule advocated by petitioner would have the opposite effect, effectively penalizing states for their attentiveness to the interests of criminal defendants. Because such an approach discourages states from implementing safeguards or cabining the discretion of sentencing courts, adoption of petitioner's position would likely work to the long term detriment of both the states and criminal defendants, and should be rejected.

CONCLUSION

Based upon the foregoing, this Court should affirm the judgment of the California Supreme Court.

Respectfully submitted,

SCOTT HARSHBARGER
Attorney General of Massachusetts

* ELLYN H. LAZAR
Assistant Attorney General

One Ashburton Place
Boston, MA 02108
(617) 727-2200

Counsel for *Amici* States

Of Counsel:
Dan Schweitzer
National Association of
Attorneys General
750 First Street, N.E.
Suite 1100
Washington, D.C. 20002

* *Counsel of Record*
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